No. 94-1023

Supreme Court, U.S.
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In The

# Supreme Court Of The United States

October Term, 1994

CARLA C. WOODCOCK,

*Petitioner,*

v.

JOURNAL PUBLISHING COMPANY, INC., ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Did the petitioner fail to raise the issue of any conflict in the interpretation of the standard of review of malice before the Connecticut Supreme Court?

2. Did the Connecticut Supreme Court correctly apply the appropriate standard of review of malice?

3. Did the petitioner fail to prove malice by clear and convincing evidence?

## PARTIES TO THE PROCEEDING

| | |
|---|---|
| Petitioner | Carla C. Woodcock |
| Respondents | Journal Publishing Co., Inc.<br>(Publisher of the Journal Inquirer newspaper) |
| | Green Manor Corporation<br>(Parent of Journal Publishing Co., Inc.)<br>(There are no other parent companies or subsidiaries) |
| | Thomas Puleo |
| | William Bellock |

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## UNITED STATES CONSTITUTION

### AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## CONCISE STATEMENT OF THE CASE

The petitioner, a member of the Town of South Windsor Planning and Zoning Commission from 1987 to 1989, sued for defamation and was awarded $1,500 in special damages and $505,000 in general damages (Petitioner's App. 2-3).

The First Count of the Complaint alleged that various defamatory newspaper articles about her doings on the commission were prepared in 1988 and 1989 by the defendant Thomas Puleo, a newspaper reporter, and published by his employer, the defendant Journal Publishing Co., Inc., in the newspaper Journal Inquirer. The Second Count alleged a failure of these defendants to disclose facts that would have changed the defamatory tone of the articles. The Third Count alleged against the Journal the publication in 1992 of a further defamatory article while this case was pending. The Fourth Count alleged that defendant William Bellock, a developer, made defamatory statements to employees of the Journal Inquirer on which some of the articles in the First Count were based; this Count also alleged that he wrote a defamatory letter to the editor (Petitioner's App. 2-3).

The jury found for the petitioner concerning some but not all of the articles alleged in the First Count, found for the defendants on the Second Count, found for the petitioner on the Third Count, and found for the petitioner on the Fourth Count for a statement incorporated in the August 4, 1988 article but not for the letter to the editor. The jury found that the petitioner was entitled to general damages of $245,000 each against the Journal and another corporate defendant, Green Manor Corporation, $10,000 against Puleo and $5,000 against Bellock, and special damages of $750 against each corporate defendant, $0 against Puleo and $0 against Bellock. The jury also found that the petitioner was entitled to punitive damages, which the court later set at $121,369.77 (Petitioner's App. 3). The total award was $627,869.77.

Motions to set aside the verdict and for judgment notwithstanding the verdict were denied and the defendants appealed (Petitioner's App. 3-4).

The Connecticut Supreme Court reversed and directed judgment for the defendants (Petitioner's App. 25).

This case involves statements made about a public official concerning her official acts. The statements concern whether she had a conflict of interest on February 2, 1988 in voting on a subdivision application proposed by Bellock's company, Sowin Associates, because of her family's relationship with Robert J. Sheridan, who with his wife had undeveloped land adjacent to the Bellock parcel (Petitioner's App. 5-9).

The statements found defamatory fall into six categories. The first four apply to the Journal and Puleo, the fifth applies to Bellock only, and the sixth applies to the Journal only.

The statements, in order, are:

(1) Subheadlines

A subheadline on page one of the newspaper on June 23, 1988 stated,

> Developer claims Woodcock aim to aid business associate

and referred the reader to an article on page 22. The subheadline on page 22 stated,

> Woodcock accused of seeking changes to benefit business associate

and was immediately followed by the article, the first paragraph of which stated that the business associate, Sheridan, "had business relationships with the Woodcock *family*." [emphasis added.] The petitioner made no claim that this statement was false (Petitioner's App. 8).

The petitioner also made no claim against the Journal and

Puleo for reporting that the developer, Bellock, made an accusation against her. The sole claim is that Sheridan was not *her* business associate (Petitioner's App. 8).

There was no evidence that Puleo had anything to do with preparing the two subheadlines in issue. Both Puleo and Susan Sarvay, the editor of the article, testified that they did not notice the inaccuracy of the subheadlines. There was no evidence to the contrary (Petitioner's App. 14-15).

(2) "Urged" versus "Suggested"

Four of the articles stated that the petitioner "urged" the commission to alter Bellock's application in a way that would have benefited Sheridan (by making the access via undeveloped Felt Road — which would have had to be improved, to the advantage of Sheridan — rather than via Foster Street, as proposed by Bellock) (Petitioner's App. 9-10).

In the earliest article, Puleo wrote the same general statement further down in the article but used the word "suggested" rather than "urged." The petitioner admitted that "suggested" was a proper characterization of what she said (Petitioner's App. 9). Indeed, the petitioner now uses that very word in her statement of facts (Petitioner's br. 4). In another article Puleo made the same general statement but used the phrase "attempted to redraw." The petitioner claimed but the jury did not find that this language was libelous. In the article in which "urged" and "suggested" were used, the reporter repeated a third time the same general statement but with the word "proposed." The petitioner made no claim concerning "proposed."

(3) "Only Member to Back this Arrangement"

Concerning the proposal urged or suggested by the petitioner, one article stated:

> She was the only commission member to back that arrangement; other members said it wouldn't conform to zoning regulations. No vote was taken on her proposal.

Only the portion of the first sentence before the semicolon was claimed and found defamatory (Petitioner's App. 9).

The petitioner's motion to deny Bellock's application passed on a 3-1 vote. Chairman Hallowell and Commissioner Sorenson, who did not make remarks in favor of the petitioner's Felt Road alternative, nevertheless voted to deny the application. They also indicated in a discussion with the petitioner prior to the vote that the application as modified by her proposal would violate commission regulations. Of the two members who originally made remarks favoring the petitioner's alternative, Commissioner Nadel did not vote, because he did not attend the prior hearing in November 1987, and Commissioner Evans opposed her motion. Nadel testified that he would not describe his position on the petitioner's proposal as "backing the proposal." (Petitioner's App. 16-17). No motion proposing the petitioner's alternative was ever made.

(4) "Back-room Deals"

One article stated:

> Woodcock won election in November 1988 as an outspoken opponent of development, denouncing the PZC as a group that had lost public support, by being aligned with developers.
>
> Woodcock herself then became the target of controversy. And, ironically, it involved developers and back-room deals.

Only the phrase "back-room deals" in the last sentence was

found defamatory (Petitioner's App. 10).

These two paragraphs were immediately followed by three paragraphs, the first discussing her opposition to a proposal by a different developer said to be on bad terms with the Woodcock family. The second paragraph quoted the chairman of the commission as accusing her of pursuing "vendettas" in opposing that developer. The third paragraph discussed the Sheridan issue. None of these three paragraphs were found defamatory. The petitioner claimed but the jury did not find defamatory a statement in an article published two days later that the Sheridan affair "hinted of back-room maneuvering" (Petitioner's App. 10, 18).

(5) "Attempt to Benefit Sheridan"

An August 4, 1988 article stated in the third paragraph:

> The developer, William Bellock of Sowin Associates, son-in-law of the JI's publisher, Elizabeth S. Ellis, has complained that Carla Woodcock's proposal to alter his plan was an attempt to benefit Sheridan at the expense of Sowin Associates. Carla Woodcock says she acted out of concern about traffic and that any benefit to abutting property owners would have been only coincidential. The PZC rejected Bellock's application and he has appealed it to Superior Court.

The jury found the phrase "has complained . . . Sowin Associates" to be defamatory as to Bellock only. The jury did not find malice in the statement published the next day and attributed to Bellock that he had "accused Carla Woodcock of trying to use the zoning board to help a friend at the expense of Sowin's application for an 11-lot subdivision." (Petitioner's App. 10, 19).

The petitioner knew at the hearing that the Sheridan parcel abutted undeveloped Felt Road and that improvement of the

road would provide access to Palmer Street from Sheridan's otherwise landlocked property. She also knew when she made her proposal to alter the subdivision plan that it would increase the cost of road construction, and decrease the number of potential lots. Finally, she admitted on both direct and cross-examination that the revised road design would have benefited Sheridan (Petitioner's App. 19).

(6) "Are Business Associates"

Four years later, on August 29, 1992, the Journal ran an article about a pending motion for summary judgment in this case. The headline and the first nine paragraphs concern that motion and a recent court ruling on another issue. In the second half of the tenth paragraph, the following sentence was found libelous as to the Journal only:

> The Sheridans *are* business associates of Woodcock and her husband, John Woodcock, III, who was then a state representative; the Sheridans had contributed to John Woodcock's political campaigns.

(Petitioner's App. 38 [emphasis added]).

This article was written by Liz Dupont, a reporter newly assigned to the Woodcock case. Dupont said that she reviewed the prior articles and other documents in preparing her story. Among such articles were two with statements claimed but not found to be libelous that Sheridan had "business and personal ties to the Woodcocks" (Petitioner's App. 20). There was no evidence that Sheridan had business ties to the Woodcock family in 1992.

The petitioner failed to call as a witness Dupont's editor on the article, Nancy Thompson (Petitioner's App. 20).

The petitioner demanded a retraction, which was given (Petitioner's App. 21).

Prior to the publication of the first article in 1988, Puleo discussed the underlying facts and charges with the petitioner, her husband, William Bellock, a local lawyer with zoning experience, the Sheridans' lawyer, the Zoning Commission Chairman, the Town Director of Planning, the seller of the land to Bellock, the political opponent of the petitioner's husband and the engineer who worked for the company which created the design for Bellock's application (Petitioner's App. 7-8, 23).

Also prior to the publication of the first article, Puleo examined land records in the South Windsor Town Hall which related to a mortgage transaction entered into by Robert Sheridan, Carol Sheridan and the petitioner's mother-in-law, Helen Woodcock, a number of years earlier; he examined the minutes of the November 10, 1987 public hearing relating to the Bellock application; he examined the minutes of the February 2, 1988 hearing on the application; he examined the plans that constituted the application; he listened to tape recordings of both the November 10, 1987 meeting when the application was presented and the February 2, 1988 meeting when it was voted on; and he examined the state statute (§8-11) relating to conflict of interest standards for public officials (Petitioner's App. 7-8).

At no time did the petitioner request a retraction of the stories written in 1988 and 1989. On July 12, 1988, the Journal published a letter by the petitioner in which she denied a conflict of interest and asserted that statements in the recently published article were untrue, but failed to identify those statements. In response to a letter written by the petitioner's husband, the editor of the Journal stated that the paper would correct any errors specified to it. There was no response to the offer (Petitioner's App. 11).

The Connecticut Supreme Court used the rule of independent review applicable to defamation cases under the First Amendment and concluded that the record failed to demonstrate by clear and convincing evidence that the defendants acted with actual malice.

## SUMMARY OF THE ARGUMENT

The petitioner cannot challenge the standard of review used by the Connecticut Supreme Court because she failed to raise that issue before that court.

The Connecticut Supreme Court correctly used the appropriate standard of review in deciding the issue of actual malice.

Even under a more restricted standard of review, the evidence was insufficient to establish actual malice.

## ARGUMENT

### 1. Failure to Raise Issue

In her brief before the Connecticut Supreme Court, the petitioner agreed that the clearly erroneous standard is inapplicable to the finding of actual malice (App. 1A). She did not then claim what she now claims, that "there exists a conflict in the interpretation of the appropriate standard of review between the deferential standard codified in FRCP 52(a) and the view that the reviewing court's scope of review is tantamount to its acting as a 'super jury'. " (Petitioner's br. 6). She therefore is precluded from raising the standard of review as an issue before this Court. See *Heckler v. Campbell*, 461 U.S. 458, 468, note 12, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983).

### 2. Appropriate Standard of Review

In *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514-15, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), this Court held

> that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by New York Times Co. v. Sullivan. Appellate judges in such a case must exercize independent judgment and determine whether the record establishes actual malice with convincing clarity.

The Court noted, however, that it could accept all of the purely factual findings of the District Court and still hold as a matter of law that there was not clear and convincing evidence of malice. 466 U.S. at 513.

It is not clear how the standard of review the petitioner is promoting (Petitioner's br. 9) differs from or clarifies the

standard as applied in *Bose*.

The conflict regarding the appropriate standard of review of actual malice among the cases cited by the petitioner is more apparent than real. In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989), this Court considered the uncontroverted evidence and the adequately supported facts that the jury did find to conclude that there was sufficient evidence of malice. *Harte-Hanks* therefore did defer to jury findings when independently reviewing the record.

The petitioner misstates the majority's position in *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. en banc), cert. denied, 484 U.S. 870, 108 S.Ct. 200, 98 L.Ed.2d 151 (1987). The majority stated that it accepted only undisputed facts or the plaintiff's version of disputed facts, avoided any evaluation of credibility, and credited all permissible inferences favorable to the plaintiff. 817 F.2d at 778. After an independent review of this evidence, the Court concluded the record was insufficient to establish actual malice.

In *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662 (9th Cir. 1990), the court expressed its concern that, in protecting First Amendment values, it should not unduly trench on the fact-finding function of the jury. 930 F.2d at 672. Therefore, basing its review on "the uncontroverted testimony, together with the cumulation of the circumstantial and documentary evidence," the court concluded there was no clear and convincing evidence of malice. 930 F.2d at 687.

*Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 714 (4th Cir. en banc 1991), acknowledged that the heightened standard of review does not allow the appellate court to revisit credibility or findings of historical facts. Reviewing the facts found by the District Court, the appellate court concluded there was no malice.

In *Bressler v. Fortune Magazine*, 971 F.2d 1226 (6th Cir. 1992), both the majority and the dissent agreed that an appellate court must give due deference to the credibility determinations of the fact-finder when independently reviewing the record. 971 F.2d at 1229, 1234.

The problem is not with the standard of review. All of the cases cited recognize the need for a heightened standard of review. All also recognize the limitations of an appellate court conducting an independent review of the facts, particularly as to credibility determinations. The difficulty arises because "only through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards. Bose, supra, at 503, 80 L.Ed.2d 502, 104 S.Ct. 1949." *Harte-Hanks*, 491 U.S. at 686. To the extent that the meaning of "actual malice" and "reckless disregard" is particularly case-bound, further generalizations as to the standard of review are neither likely nor desirable. Unless this Court wishes to reject a heightened standard of review in First Amendment cases, there will always be some tension between the reviewing court and the finder of fact. The current standard of review as applied strikes a proper balance in protecting the field of free expression. The Connecticut Supreme Court correctly used the appropriate standard of review of malice.

**3. Insufficient Evidence**

Even under a more restricted standard of review, the evidence was insufficient to establish malice by clear and convincing evidence. Contrary to the petitioner's assertions, the Connecticut Supreme Court did not substitute its findings for those of the jury. At page 529 of its opinion (Petitioner's App. 5), the court begins its discussion with a statement of those facts a jury "could reasonably have found." The court therefore gave appropriate deference to the jury's fact-finding.

Any assessment of malice must focus on the actual claims of libel. The first was that two subheadlines stated that the

petitioner was accused of seeking changes to aid "business associate" (br. 2). The first paragraph of the article stated that Robert Sheridan, the business associate, "had business relationships with the Woodcock family." The petitioner did not claim this was false.[1] The author of the article did not write the subheadline. There was no evidence that anyone at the newspaper noted that the subheadlines were inaccurate (br. 3).

The second claim of libel involved the reporter's use of the word "urge" in describing the petitioner's action in proposing a change in the subdivision application (br. 3). The author also used the words "suggested" and "proposed" in describing that same action. The petitioner did not challenge those choices (br. 3).

The third claim of libel was the statement that the petitioner "was the only commission member to back this arrangement." Of the two commission members who commented favorably on the petitioner's proposal, one abstained from voting and one voted against the petitioner's motion to deny the application. The member who abstained also testified at trial that he never used the word "back" in reference to the proposal. The two members who voted with the petitioner on the motion had told her that the subdivision, if modified as proposed, would violate commission regulations. After the application was denied, no motion to modify was made (br. 4).

The fourth libel was the statement that the petitioner became the target of a controversy which involved back-room deals. The phrase "back-room deals" was found libelous. The three paragraphs following that term in the article described the controversy involving the petitioner. None of the three paragraphs was found libelous. The jury also did not find

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[1] The Connecticut court stated this fact accurately (Petitioner's App. 8). The petitioner therefore errs in claiming that the court misconstrued her testimony (Petitioner's br. 10, note 1).

libelous a subsequent statement that what the petitioner was involved in "hinted of back-room maneuvering." (br. 5).

The fifth statement was made by the developer Bellock that the petitioner's proposal was an attempt to benefit Sheridan. The jury found this statement libelous as to Bellock, but failed to find libelous a similar statement accusing the petitioner of trying to help a friend at the expense of the subdivision application (br. 5).

The sixth statement was in an article written four years after the first article was written and after the case was brought. The statement alleged that the petitioner and her husband "are" business associates of Sheridan. That article was written by a reporter new to the case. The reporter reviewed prior articles, two of which contained statements that were found not to be libelous indicating that Sheridan had "business and personal ties to the Woodcocks." (br. 6).

The petitioner did not call the editor of the newspaper to testify as to whether she had been aware of the inaccuracy at the time the article was published. The defendants, however, conceded the statement was inaccurate and published a retraction. As for the other articles, the defendants offered to correct any errors specified by the petitioner or her husband. They declined to specify any (br. 6).

As to the first and sixth claims of libel, the Connecticut Supreme Court held that the most that could be said was that the defendants were negligent (Petitioner's App. 15, 20-21). That is not sufficient to support a finding of malice. *Rosenbloom v. Metromedia*, 403 U.S. 29, 50, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971).

As to the second, third, fourth and fifth claims, the court found that the language chosen in each circumstance was one of a number of rational interpretations of an ambiguous event. *Bose Corp. v. Consumer's Union of United States, Inc.*, 466 U.S.

at 512-13 (Petitioner's App. 15-20).

The majority of the court did not decide whether the statements were false and defamatory, although they questioned whether the term "back-room deals" was libelous at all. The concurring opinion would have held that none of the six statements was libelous as a matter of law (Petitioner's App. 18, 25-26).

The facts which could reasonably have been found by the jury support the Connecticut Supreme Court's conclusion. None of the fifteen numbered "facts" allegedly ignored by the court (Petitioner's br. 11-13) changes that conclusion. None of this evidence shows that the defendants knew the published statements were false. And in fact, the petitioner does not argue that the defendants had such knowledge. Rather, she claims that the evidence demonstrates "a purposeful avoidance of the truth," which is the "reckless disregard" component of actual malice (Petitioner's br. 14).

The jury rejected Petitioner's Fact No. 9 by finding for the defendants on the Second Count of the complaint. Most of the other claimed facts are relevant to the petitioner's assertion that the defendants were motivated by ill will (Nos. 1, 2, 14, 15) or were negligent in their investigation (Nos. 3, 5, 7, 8, 11). Nos. 4 and 6 show that a number of people reporter Puleo talked to may have been biased. The Connecticut court reviewed and rejected these claims as insufficient to show a subjective reckless disregard for the truth (Petitioner's App. 21-25). Finally, Nos. 10, 11, and 13 are relevant to one of several rational interpretations of the petitioner's actions at the meeting in question. That the defendant reporter came to a different rational interpretation does not mean he acted with malice.

Therefore, even if the jury did find the facts listed by the petitioner, those facts are insufficient to show reckless disregard for the truth in view of the investigation conducted

by the reporter, the ambiguous nature of the events described and the defendants' offer to correct any errors specified by the petitioner (br. 7). The petitioner does not dispute that Puleo conducted the investigation as described by him, most especially that he examined the minutes and listened to the tapes of the relevant commission meetings.

Unless there is no heightened appellate review at all in a First Amendment public official libel case, a position not espoused in any majority, concurring or dissenting opinion since *New York Times Co. v. Sullivan*, the plaintiff's verdict cannot stand.

## CONCLUSION

The petition for writ of certiorari should be denied.

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## APPENDIX

## APPENDIX

**Excerpt From Plaintiff-Appellee's Brief in Connecticut Supreme Court, pp. 23-24:**

**II. ARGUMENT:**

**A. The plaintiff sustained her burden of proof on every element of libel.**

**1. The plaintiff proved by a preponderance of the evidence that the newspaper articles contained false and defamatory statements about her that caused damage to her reputation.**

On a claim of insufficiency of evidence to support a verdict, this court must determine whether there is evidence on the record to support the verdict. *Miles v. Perry*, 11 Conn. App. 584, 600, 529 A.2d 199 (1987); *Atwater v. Morning News Co.*, 67 Conn. 504, 517, 34 A.2d 865 (1896). To prevail in a defamation action, a public official plaintiff must prove the publication of a defamatory falsehood and resulting damages by a preponderance of the evidence and actual malice by clear and convincing evidence. *See, New York Times v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). "Apart from the finding of actual malice, to which the rule of independent review applies, the other findings of fact (including a finding of "falsity") are properly tested under the clearly erroneous standard of review." *Holbrook v. Cassazza*, 204 Conn. 336, 344, 528 A.2d 741 (1987), *cert. den.*, 484 U.S. 1006 (1988); *Bose Corp. v. Consumer's Union of the United States, Inc.*, 466 U.S. 485, 499-500, 100 S.Ct. 149, 80 L.Ed.2d 502, *reh. den.*, 467 U.S. 1267, 104 S.Ct. 3561, 82 L.Ed.2d 863 (1984). * * *